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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of:

800 Data Base Access Tariffs and the

CC Docket 93-129

800 Service Management System Tariff

OPPOSITION

MCI Telecommunications Corporation (MCI), pursuant to Section 1.115 of the Federal Communication's Commission's ("Commission") Rules, hereby opposes the Application for Review ("AFR") filed on March 2, 1994 by Petitioners, listed below.<sup>1/</sup> Petitioners request review of a Common Carrier Bureau ("Bureau") Order,<sup>2/</sup> which denied their request for Waivers<sup>3/</sup> of an earlier Bureau 800 Designation Order.<sup>4/</sup>

Petitioners' only allegation is that the Bureau's denial of their Waivers conflicts with precedent established in the

<sup>1/</sup> Ameritech Services, Bell Atlantic Telephone Companies, Pacific Bell, the NYNEX Telephone Companies and US West Communications, Inc. are hereinafter collectively referred to as "Petitioners".

<sup>2/</sup> 800 Data Base Access Tariffs and the 800 Service Management System Tariff, CC Docket No. 93-129, Order, DA 94-99, released January 31, 1994 ("Order").

<sup>3/</sup> Ameritech, Bell Atlantic, Pacific Bell, Nevada Bell, Southwestern Bell, BellSouth and NYNEX filed a joint Petition for Waiver on September 16, 1993 (Joint Waiver). US West filed a Contingent Petition for Waiver on September 17, 1993, asking that the Commission waive its disclosure requirements if it interpreted the order to require disclosure of its model. Collectively, these pleadings are referred to herein as the Waivers.

<sup>4/</sup> 800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation, 8 FCC Rcd. 5132 (1993) ("800 Designation Order").

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Commission's ONA Order<sup>5/</sup> and ONA Cost Order<sup>6/</sup> and, thus, violates the Commission's Rules and the Communications Act itself.<sup>7/</sup> MCI will demonstrate herein the Bureau's Order was reasonable and fully consistent with the Commission precedent cited by Petitioners. Therefore, the Bureau acted within its authority and Petitioners' AFR should be denied by the Commission.

Petitioners' Waivers sought relief from an alleged 800 Designation Order requirement that they disclose, on the record, the CCSCIS cost model in support of their 800 database rates.<sup>8/</sup> In their Waivers, Petitioners contended that the CCSCIS model is a trade secret and confidential commercial information, and that engineering and cost information provided by the switch vendors is proprietary to those vendors. Relying upon the ONA Order, Petitioners requested that the Bureau permit disclosure of the

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<sup>5/</sup> Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, Order, FCC 93-532, released December 15, 1993 ("ONA Order").

<sup>6/</sup> Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, Order, 9 FCC Rcd. 180 (1993) (ONA Cost Order)

<sup>7/</sup> AFR at 3.

<sup>8/</sup> The Bureau in its 800 Designation Order required "price cap LECs using computer models to develop costs in their direct cases [to] disclose those models on the record if their justification for their [800 database access] rates is based on the use of the model." 800 Designation Order at para. 29 and footnote 24. Carriers that chose not to disclose these models were obliged to provide "some other justification for ... rates." Id. at para. 29.

CCSCIS model only under specific conditions.<sup>9/</sup> The Bureau denied the Waivers.

In the AFR, Petitioners seek review of that decision. They assert that the Commission's ONA Order established standard procedures for limited intervenor review whenever proprietary supporting data is used to develop a tariff rate for a new service based on forward looking costs.<sup>10/</sup> Petitioners conclude that the Bureau's Order, in denying Petitioners the option of using these procedures, was in conflict with the Commission's requirements.<sup>11/</sup>

Petitioner's assertion that the ONA Order extends standard secret ratemaking procedures to all new rates based on forward looking costs is simply ludicrous. MCI believes that the largely secret ratemaking process used for ONA rates was itself a violation of Sections 201-05 of the Communications Act of 1934, the Administrative Procedure Act and constitutional due process requirements that intervenors be permitted meaningful participation in the investigation of new rates.<sup>12/</sup> However, even assuming that

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<sup>9/</sup> Petitioners offered an alternative proposal put forth in their Joint Waiver, which provided: 1) Bellcore assistance to the Bureau in its evaluation of the reasonableness of the model; 2) equipment vendor certification that the price, capacity and discount information provided to Bellcore was accurately reflected in the models used by the BOCs; and 3) intervenor access to redacted documentation upon execution of an appropriate non-disclosure agreement. AFR at 10-11.

<sup>10/</sup> AFR at 3.

<sup>11/</sup> Id.

<sup>12/</sup> See, e.g., American Television Relay, Inc., 63 F.C.C. 2d 911, 921 (1977) (FCC consideration of evidence that other parties have no opportunity to review violates "their right to due process.")

the Commission's decision is valid precedent, it does not extend these unusual procedures beyond the specific circumstance of the ONA proceeding. The Commission in the ONA Order explicitly stated that it did not expect that the unusual procedures adopted for the review of ONA tariffs would be employed in future without substantial justification.<sup>13/</sup>

One needs only to compare the Commission's decision to limit full access to cost support for ONA tariffs with other proceedings involving tariffed cost support to illuminate the unusual and unique nature of the initial ONA tariffing process. The Commission has long had on-the-record cost support requirements that apply to carriers filing tariffs.<sup>14/</sup> When the Commission adopted price cap regulation for AT&T in 1989 and for the LECs in 1990, it substituted price and demand data for previously acceptable cost support, but did not eliminate cost support requirements entirely.<sup>15/</sup> For new services, such as 800 vertical features access service full cost of service data is still mandatory.<sup>16/</sup> Thus, on-the-record disclosure of cost support is so embedded in the foundation of federal tariff regulation that departures from this norm are rare.<sup>17/</sup>

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<sup>13/</sup> ONA Order at 181, fn. 17.

<sup>14/</sup> 47 C.F.R. Section 61.38.

<sup>15/</sup> 47 C.F.R. Sections 61.41-49.

<sup>16/</sup> 47 C.F.R. Section 61.49.

<sup>17/</sup> Until the ONA decision, the Commission had recognized two policy reasons for not requiring cost support -- (1) that the  
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In fact, the Commission faces difficult legal issues if it attempts to reach decisions on tariff investigations based on secret information. Sections 553 and 554 of the Administrative Procedure Act require that agency determinations be made on the record, for both rulemakings and adjudications. It is precisely for this reason that the Commission, in handling the ONA docket, carefully and at length considered whether SCIS needed to be given proprietary treatment, whether other cost support could be used, whether portions of SCIS could be disclosed to participants in the docket under confidentiality agreements, and whether the partial disclosure as executed by the BOCs was sufficient.<sup>18/</sup> These

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<sup>17/</sup> (...continued)

carrier in question lacked market power that made it unlikely that rates would be unreasonably high or low, or (2) that the carrier was so small that filing cost support would be administratively burdensome. See, e.g., BellSouth Corporation, Memorandum Report and Order, 3 FCC Rcd 6961 (1988) (LECs don't need to file cost support for packet switching); Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991) (AT&T no longer needs to file cost support for business services); Regulation of Small Telephone Companies, 2 FCC Rcd 3811 (1987).

<sup>18/</sup> See, Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (1991), Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, 6 FCC Rcd 6131 (Com. Car. Bur. 1991), Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521 (Com. Car. Bur. 1992), App'n. for Review denied, 8 FCC Rcd 422 (1993); Allnet Communications Services, FOIA Control No. 92-266, 7 FCC Rcd 6329 (1992), upheld Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992). Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992), App'n for review denied, ONA Order, petition for reconsideration pending. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 5307 (Com. Car. Bur. 1992), Open Network  
(continued...)

lengthy deliberations are testament to the difficult and uncertain legal terrain caused by keeping material in tariff investigations secret. Commission assent to this extremely suspect process was allegedly justified because, due to the unusual importance of ONA rates and unusual complexity of the allocations, the use of sophisticated, proprietary models was necessary. Critical to the Commission's decision were claims that full disclosure to the public, even with a disclosure agreement, would jeopardize the implementation of ONA if switch vendors were to refuse to provide their data to Bellcore and the BOCs were unable to produce the requisite cost support.<sup>19/</sup> Thus, the Bureau tolerated complex redaction procedures that were purported to provide meaningful participation while protecting the proprietary models.

In explanation, the Commission cited a footnote from a companion order to the ONA Order,<sup>20/</sup> the ONA Cost Order, which states:

Unusual procedures were necessary in the ONA context to enable a degree of intervenor access to these proprietary models and proprietary vendor data, including the requirement of an independent review of the software model. While we cannot rule out the prospect that some subsequent rate development method will entail a similar procedure, carriers should not routinely support proposed rates through the use of proprietary models or data. This entails substantial additional burdens on carriers, intervenors and Commission staff in order to ensure that intervenors maximum access consistent with protection of

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<sup>18/</sup> (...continued)

Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, Order, 9 FCC Rcd. 180 (1993), recon. pending.

<sup>19/</sup> ONA Order at 180.

<sup>20/</sup> Id.

proprietary materials. Therefore, when carriers rely on such materials to support tariff filings, they bear a substantial, initial burden of demonstrating the circumstances that preclude reliance on publicly available data.<sup>21/</sup>

Petitioners readily admit that the redaction procedures used for the ONA proceeding were burdensome to both Petitioners and intervenors.<sup>22/</sup> Further, many intervenors maintain the procedures completely prevented meaningful review of the record.<sup>23/</sup>

Thus, the Bureau was not required here by earlier precedent to tip the scales in favor of the "unusual procedures" of the ONA proceeding. To the contrary, assuming the ONA Order is valid precedent, the Bureau was only required to evaluate whether the LECs had met their "substantial burden" of proof that they should be allowed to rely upon non-disclosed cost models to justify their 800 database rates.

In its Order, the Bureau clearly articulated where Petitioners fell short of meeting this burden. The Bureau denied the Waivers because the LECs had failed to demonstrate the burdensome process used for ONA was reasonable for the 800 database tariff proceeding.<sup>24/</sup>

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<sup>21/</sup> ONA Cost Order at fn. 163 [emphasis added].

<sup>22/</sup> AFR at 4.

<sup>23/</sup> See, e.g., MCI Petition for Reconsideration, CC Docket 92-91, filed January 14, 1994.

<sup>24/</sup> Order at para. 14.

The Bureau found "good reason for using different approaches in the two proceedings."<sup>25/</sup> Specifically, the Bureau found that for 800 database basic rates, compared to ONA rates, investment and cost allocations were less complicated. Thus, the complex models were simply not necessary, and the complicated procedures for protecting them was unwarranted.<sup>26/</sup> Petitioners used the CCSCIS model from Bellcore to develop at least some of their cost support for the 800 data base tariffs, but some LECs did not use a cost model to determine the investment for 800 database basic query service. Even LECs that allege a need to separate shared facilities costs developed ancillary means for identifying costs specific to 800 database, which did not compromise the results.<sup>27/</sup> For 800 vertical features rates, the Bureau found that the revenue impact was so small that accuracy in development of the rates could be compromised somewhat in the interest of public disclosure of

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<sup>25/</sup> Id.

<sup>26/</sup> The Commission stated: "In the ONA proceeding, the LECs had to calculate the investment required to produce many dissimilar services that could be provided through the same switch. It was also critical that we calculate costs for the Basic Service Elements (BSEs) as accurately as possible. In the 800 database proceeding, however, the shared facilities are currently only used to provide a few services of similar nature. These services typically involve queries to a database and the relative costs can be allocated by some means other than the CCSCIS cost model. . . . In the present case, the petitioners have not shown substantial justification for using non-disclosed cost support, because, for the calculation of the exogenous costs incurred to provide basic 800 database query service, there are alternative methods that can be disclosed without revealing proprietary or confidential LEC or third party information." Id.

<sup>27/</sup> Petitioners Reply to Oppositions to Joint Waiver at 10.



cost data and avoiding burdensome ONA procedures.<sup>28/</sup> In sum, the Bureau concluded that other disclosed means or models for allocating costs for 800 database rates should be utilized.<sup>29/</sup>

The Commission also recognized that, if Petitioners chose to rely on confidential models, the Commission would enforce nondisclosure agreements through an order.<sup>30/</sup> Redaction procedures were tolerated initially in the ONA proceeding largely due to the perceived inadequacies of such agreements to protect proprietary data and the Bureau's conclusion that disclosure could jeopardize implementation of ONA. However, while the ONA proceeding was in progress, the Commission adopted a standard protective agreement for discovery in enforcement proceedings that addresses many of the confidentiality concerns raised in the ONA proceeding.<sup>31/</sup> This new agreement, together with an enforcement order, would surely provide sufficient protection for any cost model that Petitioners choose to file in lieu of other available alternative cost support.

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<sup>28/</sup> The Commission explained that "[v]ertical features involve such relatively small revenues that they are incidental to the basic 800 database query and the LECs' desire to use cost models to calculate vertical features rates does not provide substantial justification for the LEC's request to rely on non-disclosed cost support." Id.

<sup>29/</sup> In fact, Petitioners each developed alternative cost support, filed on March 15, 1994.

<sup>30/</sup> Order at para. 15.

<sup>31/</sup> See, Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket 92-26, Report and Order, 8 FCC Rcd 2614 (1993).


Thus, the Bureau upheld the requirement that whenever it is possible, cost data must be disclosed on the record. It would be contrary to the Commission's rules, the Administrative Procedure Act and the constitution to allow Petitioners to routinely escape public disclosure of their cost data by hiding behind "confidentiality" of their models. Nor would it be in the public interest to require burdensome redaction rules to become a routine part of the tariff review process for new services.

**CONCLUSION**

Petitioners have failed to meet their burden under Section 1.115 of the Commission's Rules of demonstrating that the Bureau exceeded its delegated authority. Thus, MCI respectfully requests that the Commission deny the Petitioners' AFR.

Respectfully Submitted,

**MCI TELECOMMUNICATIONS CORPORATION**



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Dated: March 17, 1994

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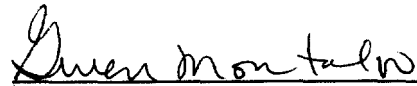
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